United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

76-7348

ORIGINAL

To be argued by
Saul Z. Cohen

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P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

-against-

THE BOARD OF EXAMINERS,

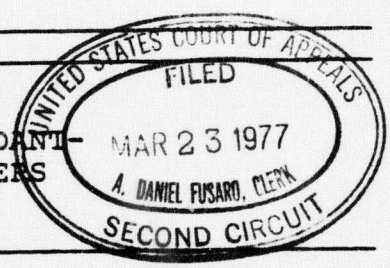
Defendant-Appellant,

-and-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK
AND THE CHANCELLOR OF THE CITY SCHOOL DISTRICT,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York



SUPPLEMENTAL BRIEF FOR DEFENDANT-
APPELLANT BOARD OF EXAMINERS

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SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLANT BOARD OF EXAMINERS

PRELIMINARY STATEMENT

This Supplemental Brief for Defendant-Appellant Board of Examiners is filed in order to bring to this Court's attention the recent decision of the United

States Supreme Court in Village of Arlington Heights v. Metropolitan Housing Development Corporation, 97 S. Ct. 555 (1977). As shown below, that decision buttresses the Board of Examiners' position that this case should be dismissed.

ARGUMENT

ARLINGTON HEIGHTS CONFIRMS THAT DEFENDANTS COULD NOT BE LIABLE HERE SINCE THERE WAS NO INTENT TO DISCRIMINATE.

This appeal is from the district court's July 7, 1976 Judgment which, inter alia, "modified" both the Final Judgment on Consent entered July 12, 1973 (the "Consent Judgment") and an "Order Modifying the Final Judgment and Order" entered March 25, 1975. One of the principal issues on this appeal is the impact on this case of the Supreme Court's decision in Washington v. Davis, 426 U.S. 229 (1976). Defendant-appellant Board of Examiners has contended* that Washington requires that this Court's prior decision (Appeal No. 71-2021, 458 F.2d 1167, decided April 5, 1972) affirming the issuance of a preliminary injunction herein be reversed, that the Consent Judgment be vacated insofar as it restrains defendants' conduct prospectively and that this case be dismissed.

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* See the Board of Examiners' Main Brief, pp. 16-32 and its Reply Brief, pp. 4-12.

Washington v. Davis held that in order to make out an employment discrimination case brought -- like the instant one -- under the United States Constitution (but not under Title VII of the Civil Rights Act of 1964), it is necessary to prove that defendants had "a racially discriminatory purpose" or intent and that proof that an examination had a racially disproportionate impact or effect is not sufficient to that end. Moreover, the Supreme Court in Washington expressly disagreed with a number of decisions from the Courts of Appeals, including this Court's 1972 decision affirming the issuance of a preliminary injunction herein, on the ground that those decisions enunciated and applied an erroneous constitutional standard.

In their opposing briefs,* both appellees have taken issue with what Washington v. Davis held. They have contended that Washington did not hold that an intent or purpose to discriminate must be proven in a case such as this in which official conduct is challenged on constitutional grounds as being discriminatory.

On January 11, 1977, the Supreme Court rendered its decision in the Arlington Heights case. That decision

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* See the Board of Education's Brief, pp. 12-15 and the plaintiffs' Brief, pp. 27-31.

held in unmistakable terms that intent to discriminate is required in every case arising under the Constitution and thus forecloses appellees' contentions here with regard to the Washington v. Davis issue.

In Arlington Heights, a local zoning commission's refusal to rezone property from a single family to a multiple family classification was challenged as being discriminatory and in violation of the Equal Protection Clause of the Fourteenth Amendment. Although the Seventh Circuit had agreed with the district court's finding that the refusal to rezone was not motivated by discrimination, it reversed the dismissal of that case because it concluded that the "ultimate effect" of the refusal was discriminatory.*

In turn, the Supreme Court reversed. Justice Powell's Opinion of the Court held on behalf of a unanimous court** that:

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* Significantly, the Seventh Circuit's Arlington Heights decision was one of those -- in addition to this Court's 1972 Chance decision -- with which the Supreme Court expressly disagreed in Washington v. Davis because it applied an erroneous constitutional standard. See 426 U.S. at 244-245 & n.12.

** Justices Marshall and Brennan concurred in this holding but would have remanded the entire case ". . . for further proceedings consistent with Washington v. Davis. . . ." 97 S. Ct. at 566, 567. Justice Stevens took no part in the Supreme Court's consideration or decision in Arlington Heights. Id. at 566.

> "Our decision last Term in Washington v. Davis, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.' Id. at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 97 S. Ct. at 563. (Emphasis added.)

Because the plaintiffs in Arlington Heights had failed to prove that a discriminatory purpose was a motivating factor in the refusal to rezone, the Supreme Court held that "[t]his conclusion ends the constitutional inquiry" and that the Seventh Circuit's finding of "a discriminatory 'ultimate effect' is without independent constitutional significance." 97 S. Ct. at 566. Accordingly, the Supreme Court reversed and, although it remanded for further proceedings with regard to a statutory issue not relevant here, its reversal on the constitutional issue was outright and called for dismissal of the plaintiffs' constitutional claims.

In short, Arlington Heights supports the Board of Examiners' position on this appeal for two reasons. First, because it reiterates that plaintiffs were required to prove that defendants' tests were intentionally or purposefully discriminatory. Yet, this Court's 1972 decision affirming the issuance of a preliminary injunction herein conceded that such proof was absent here. Second, because,

given the findings below in Arlington Heights, the Supreme Court reversed outright the Seventh Circuit's decision on the constitutional issue, rather than remanding for further consideration in light of Washington. That same disposition is warranted here since the record in this case is equally clear that plaintiffs have not established intentional or purposeful discrimination.

CONCLUSION

It is respectfully submitted that, in view of the Supreme Court's decision in Village of Arlington Heights v. Metropolitan Housing Development Corporation, the Judgment entered below should be reversed and this case dismissed in its entirety.

Dated: New York, New York
March 17, 1977

Respectfully submitted,

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